United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7294

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

—against—

IRENE SOLOMON and LOUIS SCHUSTER, as Trustee of the S & L Pension Trust, R.T.B. Industries, Inc.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

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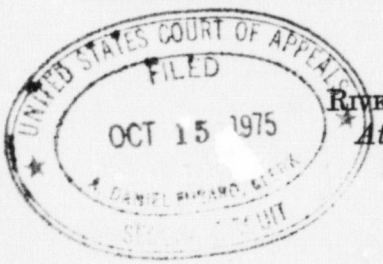
REPLY BRIEF FOR DEFENDANTS-APPELLANTS



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POINT I

Summary judgment is a harsh remedy which should only be granted when there are no material issues of fact.

In this action to rescind a life insurance policy because of an alleged material misrepresentation in the policy application, the decision below by the Honorable D. J. Buchhausen (United States District Court, Eastern District, New York) granted summary judgment in favor of plain-

tiff-appellee. Defendants-appellants appeal this decision herein and contend that there are many factual issues which can only be resolved by a plenary trial wherein the appellee's supposed proofs may be subject to full cross-examination.

"Summary judgment is a very drastic remedy. It says to the losing party that the court is so certain that nothing you have said even raises a material issue that you will be denied an opportunity to have a day in court on your claims." *Johnson Foils, Inc.* v. *Huyck Corp.*, 61 F.R.D. 405 (1973).

"The emphasis in a motion for summary judgment is that a court must be *certain* that a court is not depriving a party of a fundamental right to a trial. This is why the court puts great burdens of proof upon the movant and allows presumptions in favor of the opposing party." *Nyhus* v. *Travel Management Corp.*, 463 F. 2d 440, 442 (U.S. App. D.C. 1972); *Pitts* v. *Shell Oil Co.*, 463 F. 2d 331, 335 (5th Cir. 1972); *Empire Electronics Co.* v. *United States*, 311 F. 2d 175 (2d Cir. 1962). For summary judgment to be properly granted the movant must demonstrate entitlement beyond a reasonable doubt. *James* v. *Topeka & Santa Fe Ry. Co.*, 464 F.2d 173 (C.A.N.M. 1972).

POINT II

Disputed factual issues concerning the materiality of the alleged misrepresentations should have precluded the granting of the motion for summary judgment.

In Point I of his brief, appellee argues that the alleged misrepresentations made by the deceased in his application for insurance were material as a matter of law.

Appellee lists and discusses numerous cases in support of his contention (Pl-Appellee Br. 13-16).

Appellants' argument, however, as presented in Point I of his original brief, is that the question of materiality "as a matter of law", is not one to be decided on a motion for summary judgment. Rather, the question should be decided only after evidence on the issue of materiality has been presented at the trial, with an opportunity for cross examination. Appellant lists and discusses numerous cases in support of his contention (Def-Appellant Br. 7-10).

Appellee has completely neglected to respond to this argument. The cases discussed in Point I of his brief do stand for the proposition that the misrepresentations were material as a matter of law. In none of these cases, however, was the issue of materiality decided on a motion for summary judgment. In each of them, evidence on the issue of materiality was presented at trial. In fact, in one of the cases appellee cites, *Vander Veer* v. *Continental Cas. Co.*, 30 AD 2d 506 (3rd Dept. 1968), the defendant insurance company's motion for summary judgment was denied. Later, after a jury trial, the Court of Appeals reversed a judgment for the plaintiff beneficiary and held that misrepresentations made by the deceased were material as a matter of law. *Vander Veer* v. *Continental Cas. Co.*, 34 NY 2d 50 (1974). Note that the issue of materiality was not ultimately decided until evidence had been presented at trial.

Appellee has also argued in Point I of his brief that the factual proof upon which the court based its finding of materiality was sufficient (Pl-Appellee Br. 18). The proof consisted of a single, unsupported affidavit of the medical director of the insurance company in which he stated that a policy would not have been issued if the deceased's true medical history and condition were known.

Appellee cites no case in which misrepresentations were held to be material on the basis of a single, unsupported affidavit. Rather, he supports his argument by citing cases in which almost identical misrepresentations were found to be material as a matter of law (Pl-Appellee Br. 18), overlooking the fact that in none of them did the proof consist of a single affidavit. In all of the cases cited by respondent, the proof consisted of testimony given at the trial, subject to full cross examination.

Appellant therefore maintains that the factual proof upon which the judgment was based was not sufficient, and refers to Point I of his original brief which he discusses several cases in which the decision that a misrepresentation was material as a matter of law was based on *substantial, uncontroverted* evidence, and not a single affidavit (Def-Appellant Br. 7-10).

Further, appellee would have this court find the medical director's affidavit sufficient to support a finding of materiality in that it sets forth the "medical facts" concerning the insured's heart disease and appellee contends that "appellants have at no time disputed those facts (Pl-Appellee Br. 18). In fact, the quoted portion of Dr. McCracken's affidavit (Pl-Appellee Br. 19) does no more than describe arteriosclerotic heart disease, Class II-B. Appellant does not dispute that this textbook definition represents a fair portrayal of arteriosclerotic heart disease. However, appellant has continually disputed the question of whether the assured did, in fact, suffer from the disease in that he never had an abnormal EKG reading. Further, the question of whether or not the insured did in fact suffer from heart disease should be left for a jury to decide (Def-Appellant Br. 10-12).

Finally, appellant wishes to note that it is not his contention, as respondent maintains in Point I of his brief,

that the insurance company must demonstrate that it never issued a policy of life insurance to applicants under similar circumstances in order to hold that the misrepresentations were material (Pl-Appellee Br. 19-20). Appellant merely argues that he should have the opportunity to introduce evidence on the issue of past insurance company practices, as permitted by subdivision 3, Section 149 of the New York Insurance Law, and refers to *Bean* v. *Metropolitan Life Ins. Co.*, 7 Misc. 2d 1044, 166 N.Y.S. 2d 814 (Sup. Ct. Warren County 1957) and *Roth* v. *Equitable Life Assurance Soc. of the United States*, 186 Misc. 612, 50 N.Y.S. 2d 119 aff'd. 269 App. Div. 746, 55 N.Y.S. 2d 117 (1st Dept. 1947) cited in his original brief in support of this contention (Def-Appellant Br 8-9). Appellant maintains that such an opportunity was not preserved for the defendant in the case at bar.

POINT III

A jury question exists on the issue of whether or not the insurance company had notice of the insured's condition.

In Point II of his brief, appellee addresses himself to the issue of whether the insurance company had constructive notice of the deceased's complete medical history. Appellee concludes that the trial court correctly held as a matter of law that no such constructive notice existed. Appellee relies on several cases which reach a similar conclusion based on their own peculiar facts (Pl-Appellee Br. 22-25).

Appellant does not maintain, as suggested by appellee, that the insurance company in the case at bar had constructive notice of the undisclosed facts (Pl-Appellee Br.

21-22). Rather, appellant merely maintains that, under the circumstances of the case as outlined by appellant in Point III of his original brief, a genuine issue of fact exists as to whether the company had been put on notice (Def-Appellant Br. 12-16).

In addition, even if the circumstances of the case at the time of the application did not put the insurance company on constructive notice of the undisclosed facts, a question of fact nevertheless exists as to whether the company should be charged with such notice. At the time of the application, the company on its own undertook a "standard" investigation of the deceased which did not uncover any of the undisclosed facts (Pl-Appellee Br. 5). Following the death of the deceased, a "routine" investigation did uncover all of the facts (Pl-Appellee Br. 7). Therefore, the jury should be permitted to pass on the question of whether the company should be charged with constructive notice as a result of the "standard" investigation, since a "routine" investigation would have uncovered all of the facts.

CONCLUSION

The judgment of the court below should be reversed and a trial ordered to resolve the disputed factual issues.

Respectfully submitted,

RIVKIN, LEFF & SHERMAN
Attorneys for Defendants-Appellants

On the Brief:

LEONARD L. RIVKIN
HARVEY WEINIG

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS ::: FOR THE SECOND CIRCUIT

NATIONAL LIFE

VS

SOLOMON & SCHUSTER

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

AFRIM HASKAJ being duly sworn,

deposes and says that he is over the age of 18 years and resides at 1481 42nd street Brooklyn, N.Y.

That on the 15th day of October, 1975 19 at

he served the annexed reply brief of defendants-appellants upon

LeBouf, Lamb, Leiby & MacRae, esqs, One Chase Manhatten Plaza, N.Y, N.Y.

in this action, by delivering to and leaving with said attorneys three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 15th day of October, 1975 19

Afrim Haskaj

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977